No. 80-581

In The

Supreme Court of the United States

October Term, 1981

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER AND LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, AND WESTMORELAND RESOURES, INC. and WESTERN ENERGY COMPANY,

Appellants,

— against —

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, ELLEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, MORRIS L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE QUESTIONS PRESENTED

1. Was the Montana Supreme Court correct in dismissing the appellants' claims in light of the provision of the Mineral Lands Leasing Act affirmatively endorsing the right of the states to levy severance taxes and determine the rate of those taxes.

2. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax did not impose an unconstitutional burden on interstate commerce in light of the unbroken line of precedents in this and other courts sustaining such taxes over Commerce Clause challenges?

3. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax satisfied the Commerce Clause requirement that a tax be fairly related to services provided by the state in light of the fact that Montana has provided the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society [*Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)]?

4. Was the Montana Supreme Court correct in concluding that Montana's severance tax, which is "imposed on each ton of coal produced in the state," does not discriminate against interstate commerce?

5. Was the Montana Supreme Court correct in dismissing appellants' federal preemption claims where those claims were not based on any specific statutory provision but rather on an assertion that a general national aspiration may preempt a state tax?

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STATEMENT OF THE CASE

Montana imposes a severance tax on "each ton of coal produced in the state" based on the value and energy content of the coal and the method of extraction. Section 15-35-103, MCA. The effective rate of tax is less than the statutory rate because other taxes paid on production to federal, state, and local governments are excluded in computing the value of coal.[1] The tax applies equally to coal consumed in Montana and coal destined for shipment out of state.

Nature has graciously endowed the State of Montana with a wealth of natural resources, including large deposits of low sulphur coal.[2] Throughout its history, Montana's economy has depended upon the development of those resources. In the words of one historian, "Nature, not the evil designs of men, decreed that Montana be a place with a colonial economy." K. Ross Toole, *Montana: An Uncommon Land* 7 (1957). As a result, Montana has long suffered economic dislocations of boom and bust cycles of mineral production, along with the scars left from

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1 Section 15-35-103, MCA, provides that the value of the coal is the contract sales price. Section 15-35-102 (1), MCA, defines contract sales price as "the price of coal extracted and prepared for shipment f. o. b. mine, excluding the amount charged by the seller to pay taxes paid on production . . ." Taxes paid on production are defined in § 15-35-102 (6), MCA.

2 The entire United States is rich in coal, with approximately 31% of the known recoverable coal in the world, representing a several hundred years supply. President's Commission on Coal, *Report to the President* (1980). Coal deposits are found in 31 states and mined in 26. President's Commission On Coal, *Coal Data Book*, 62-63, 66 (1978). In 1977 Montana Coal Production was 20 million tons, or 3% of the entire U. S. production. *Id.* at 66-67, 89.

mining operations. Montana's history with mining was aptly described in the opinion of the court below:[3]

> Montana's experience has shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent. (J. S. 7a.)

Historically, Montana's mining has principally involved gold, silver, copper, and other metalliferous ores. Then the 1970's brought the prospect of a substantial expansion of coal strip mining.

In 1974 the Montana Legislature adopted resolutions seeking an interim study of taxation on coal production.[4] The interim study proposed several tax alternatives,[5] and in 1975 the Montana legislature enacted the present coal severance tax (Laws of Montana (1975), Ch. 525). The actual rate of the tax was settled by conference committee. In its report to the legislature that committee stated:

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3 Montana historian K. Ross Toole gives a similar description in *Montana: An Uncommon Land* 7 (1957): "Montana's growth in one sense, has been a series of traumas. There has been a strikingly consistent pattern which, appropriately enough, conforms to the pattern of the land itself. For every pinnacle there is an equally impressive declivity. For every sudden rise, a sudden fall. Optimism has alternated almost monotonously with despair."

4 House Resolutions 45 and 93 and Senate Resolution 83, Laws of Montana (1974) pp. 1419, 1453, & 1683.

5 Montana Legislative Council, *Fossil Fuel Taxation* (December, 1974).

> In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline."

Montana Legislative Council, *Statement To Accompany The Report Of The Free Joint Conference Committee On Coal Taxation* (April 16, 1975) [A copy has been filed with the clerk of this Court]. Thus in enacting the tax, the legislature carefully considered the legitimate needs of the State of Montana, including the need for revenue for the general support of government.

In 1976 the voters of Montana revealed their determination to reverse historical trends by overwhelmingly adopting a referendum to amend the Montana Constitution to provide that fifty percent (50%) of the proceeds from the tax be dedicated to a permanent trust fund. Montana Constitution, Art. IX, § 5. The trust fund represents a self-imposed savings account to pay for future costs of unforeseen social and environmental impacts caused by strip mining, as well as to assist in stabilizing the State's economic base when its resources are depleted or the mining activity ceases.

Many states have severance taxes. The first such tax was imposed by the State of Michigan in 1846,[6] and by 1979 thirty-three states had adopted some type of severance tax.[7] Severance taxes are levied on oil, gas, coal,

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6 United States Department of Agriculture, *State Taxation of Mineral Deposits and Production* (1978).

7 Bureau of Census, *State Government Tax Collections in 1979*, Table 3 (1980).

copper, potash, uranium, molybdenum, vermiculite, sulfur, dolomite, sand, gravel, limestone, forest products, iron, taconite and even salt. In terms of total state revenues, severance taxes in 1979 represented 25.5% of total tax collections for Wyoming; 22% for Louisiana; 21.1% for Alaska; 18.5% for Oklahoma; 18% for Texas; and 13.5% for Montana.[8]

When viewed as a tax on energy, Montana's coal tax rate compares favorably with the tax rates imposed on oil and gas by Texas, Louisiana, Oklahoma and New Mexico. A recent study undertaken by the State of Texas for fiscal years 1977 and 1978 determined that the Texas severance tax was 6.36 cents per million BTU's of oil and gas. The rates for a million BTU's in Louisiana, Oklahoma and New Mexico were 10.26, 8.13 and 7.76 cents respectively.[9] Montana's tax per million BTU's of coal was approximately 7.11 cents.[10]

The appellants—four (4) coal companies and several of their utility customers—have brought the present ac-

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8 *Id.* Collections by the top ten states for 1979 were as follows:

1.	Texas	$1,025,550,000
2.	Louisiana	511,589,000
3.	Oklahoma	280,982,000
4.	Alaska	173,685,000
5.	New Mexico	159,431,000
6.	Kentucky	154,017,000
7.	Florida	91,901,000
8.	Wyoming	87,419,000
9.	Minnesota	71,263,000
10.	Montana	53,919,000

9 Comptroller of Public Accounts, State of Texas, *State and Local Taxes On Oil and Gas Production: A Comparison of Texas, Louisiana, Oklahoma,* and *New Mexico* (1979).

10 See Coal Severance Taxes: Hearing on H. R. 6625 and H. R. 7163 before the Subcommittee on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 78 (1980).

tion seeking a declaration that the Montana coal severance tax is excessive and unreasonable. They also seek a refund of severance taxes paid under protest since the second quarter of 1978. The real parties in interest are the appellant coal companies, which conduct extensive strip mining operations in Montana. These coal companies are Montana taxpayers, and the tax is imposed on their local activities. The various utilities join as plaintiffs based upon appellants' assertion that the coal companies pass Montana's tax through to their utility customers rather than absorbing the tax.[11]

The appellants have made numerous factual assertions in their brief. Many of these factual statements are irrelevant to the constitutional arguments presented here. In any event Montana does not concede that appellants' factual assertions are true, but rather asserts that the appellants can prove no set of facts in support of their claims which would entitle them to relief, *Commonwealth Edison v. Montana*, — Mont. —, 615 P. 2d 847, 849 (1980); *Conley v. Gibson*, 355 U. S. 41 (1957).

SUMMARY OF ARGUMENT

Appellants' claims in this case are based entirely upon assertions that the rate of Montana's tax is too high and that a Court is an appropriate and capable institution to

11 Recent studies prepared for the State of Montana show (assuming 100% Montana's tax is passed on to the consumer) that the severance tax would account for only ½ of 1% to 2% of the residential consumer's final utility bill. Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2d Sess., 448, 506 (1980).

determine just how much tax the state of Montana may appropriately levy. These assertions run counter to this Court's repeated pronouncements that where the power to tax exists, it is accompanied by the right to set the rate of the tax. See *City of Pittsburgh v. Alco Parking Corporation,* 417 U. S. 379 (1974). The very nature of determining an appropriate rate of taxation is a legislative function, and neither settled principles of Commerce Clause adjudication nor Supremacy Clause analysis support appellants' contention that the courts must review Montana's tax rate to determine whether it is "reasonable."

A. Appellants' contentions are initially foreclosed by the terms of the Mineral Lands Leasing Act, which explicitly reserves to the states "the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assets of any lessee of the United States." 30 U. S. C. § 189. Through this section, Congress affirmatively endorsed the right of the states to determine appropriate rates of taxation free from federal interference.

B. The Montana Supreme Court dismissed appellants' Commerce Clause claim on two independent grounds, either of which is sufficient to sustain its decision.

First, the court followed the unbroken lines of precedent in this and other courts dismissing Commerce Clause attacks on state severance taxes. The sound principle underlying these decisions is this: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause. Under this principle, non-discriminatory state severance taxes have never been viewed as imposing a burden on interstate commerce. The principle was right when it was first articulated; it is right today; and it is not undermined by decisions relied upon

by appellants which expansively construe the power of Congress to regulate interstate commerce.

Second, considering appellants' Commerce Clause claims on the assumption that this Court's severance tax decisions were not dispositive, the state court properly rejected appellants' contentions that the levy is not fairly related to benefits provided by the state and discriminates against interstate commerce. In providing the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society," *Japan Line, Ltd. v. County of Los Angeles,* 441 U. S. 434, 445 (1979), Montana has satisfied the "fair relation" requirement enunciated by this Court in its recent Commerce Clause opinions. The tax similarly satisfies the requirement that it not discriminate against interstate commerce; the tax, both on its face and in practical effect, falls equally on coal consumed in Montana and coal destined out of state.

C. The gravamen of appellants' general preemption claim, like the substance of their other claims, is that the rate of Montana's severance tax is too high. Appellants concede that no federal statute or national policy precludes Montana from levying a severance tax on coal, but allege that the rate frustrates "the basic thrust" of federal coal policy App. Br. 16.

Appellants fail to identify any federal statute or regulation that conflicts with Montana's tax. Congress has never expressed an intention to limit the rate of coal severance taxes. Nor has it attempted to regulate the price of coal or the many variables which increase coal costs. The purported burden any tax may put on the achieve-

ment of a general policy which may have motivated Congress in adopting specific legislation is too fragile a basis to invalidate the sovereign power of a state to design its tax structure. *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978).

D. Finally, institutional considerations strongly reinforce the state court's judgment dismissing appellants' Commerce and Supremacy Clause claims. As already noted above, appellants' case ultimately rests on their objection to the rate of the Montana tax. Appellants are therefore asking this Court to do what no court has ever done, namely, to undertake its own investigation of social, economic, aesthetic and regulatory values and establish an appropriate rate of a state general excise tax. Such judgments are plainly beyond the pale of judicial inquiry. If they are to be made at all, they must be made by state legislatures and Congress, the only bodies with both the institutional resources and constitutional authority to make them.

ARGUMENT

Appellants recognize, as they must, that states may properly impose severance taxes on coal and that nothing in the Constitution or any federal law prohibits such tax measures.[12] Appellants objection—and the basis for each of their arguments in this court—is that the particular severance tax rate adopted by Montana is too high. The extent to which Montana has overtaxed appellants

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12 See App. Br. 20 n. *; J. S. 15; Brief of Plaintiffs-Appellants in the Court below 46-47; 52 n. 29; 79.

is a subject they do not address. Although we therefore do not know whether appellants would find a rate of 25%, 20% or some other amount acceptable, their counsel has informed both the Montana Supreme Court and Congress that 15% would pose no problem.[13] Appellants assert the proper percentage should be determined by the judiciary.

The State of Montana disagrees. Appellants are effectively asking this court to reverse its consistent holding that the right to tax encompasses the right to determine the rate of the tax, see, *e. g., Weston v. City Council of Charleston,* 27 U. S. 171, 174 (1829); *City of Pittsburgh v. Alco Parking Corporation,* 417 U. S. 369 (1974); and break with precedents which have rejected arguments similar to those made here—that a non-discriminatory state tax is nevertheless unconstitutional because it indirectly falls on some constitutionally immune or protected subject or activity, see, *e.g., United States v. City of Detroit,* 355 U. S. 466 (1958); *Union Pacific R.R. Co. v. Peniston,* 85 U. S. 5, 30-31 (1873). It is the State's position that precedents rejecting similar challenges to state tax rates should be followed; the "correct" rate of the severance tax on coal is a subject for legislative, not judicial regulation. Neither the Constitution nor any federal law requires otherwise.

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13 In oral argument to the Montana Supreme Court, counsel for appellants conceded that a 15% rate would be acceptable. This same concession was made to Congress. Coal Severance Tax: Hearing on S. 2695 Before the Sen. Comm. On Energy and Natural Resources, 96th Congress, 2d Sess. 262 (1980) (testimony of William P. Rogers); Coal Severance Taxes: Hearings on H. R. 6625, H. R. 6654, and H. R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce 94 (1980) (testimony of William P. Rogers).

Finally, respondents are aware of no state tax case decided by this Court in which the Court's decision was based upon a factual inquiry into the amount or indirect incidence of a tax or into the benefits furnished by the State to the specific taxpayers. This Court should affirm the decision of the Montana Supreme Court, which properly rejected Appellants' invitation to undertake the constitutionally unwarranted and judicially unmanageable task of establishing the appropriate rate of a state tax levied for the general support of government.

I. In Section 32 of the Mineral Lands Leasing Act of 1920, Congress granted the states permission to set severance tax rates as they saw fit.

It is rather ironic that in attacking the rate of Montana's coal severance tax, appellants invoke the Mineral Lands Leasing Act of 1920,[14] 30 U. S. C. § 181, et seq., a statute that thoroughly undercuts each of their various arguments in this Court. The Act confirms in the clearest possible terms that a state may impose severance taxes on coal mined from federal land; that the appropriate severance tax rate is a matter for the state to decide; and that the exercise of these state powers is entirely consistent with federal law.

The Act contains a proviso that constitutes nothing less than congressional permission for the states to enact the type of taxing measures at issue in this case. Thus, section 32 of the Act, 30 U. S. C. § 189, provides:

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14 Ch. 85, 41 Stat. 437. Some of the Act's history is recounted in the Court's opinion in *Andrus v. Shell Oil Co.*, — U. S. —, 100 S. Ct. 1932 (1980).

> That nothing in this Act shall be construed or held to affect the rights of the States or the local authority to exercise any rights they may have, including the right to levy and collect taxes upon improvements, *output of mines,* or other rights, property, or assets of any lessee of the United States. (Emphasis supplied.)

As the Court held more than fifty years ago, Congress intended section 32 "to remove altogether from the field of controversy, among other questions, . . . the authority of the states to impose taxes upon lessees in respect of their property" regardless of the interest of the United States in the leased land. *Mid-Northern Oil Co. v. Walker,* 268 U. S. 45, 48-49 (1925).

That Congress imposed no limits on the rates of state severance taxes does not render section 32 "irrelevant," as appellants contend (App. Br. 48). The absence of any such limitation is highly significant. As the history of this section reveals, Congress ratified the power of the states to impose severance taxes and deliberately used language that would allow the states to do so at the rate they saw fit.

The withdrawal of most areas of federal coal and oil lands by Presidents Theodore Roosevelt and William H. Taft prompted efforts to adopt a comprehensive federal leasing act for oil, gas and coal.[15] During the House debate on an early version of the Mineral Lands Leasing Act

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15 See generally, Gates, *History of Public Land Law Development* 725-736 (1968); Peffer, *The Closing of the Public Domain* 110-133 (1951). After the first withdrawals, President Roosevelt sent a message to Congress suggesting "that there should be some provision for leasing coal, oil and gas rights. . . ." 41 Cong. Rec. 450 (1906); 41 Cong. Rec. 2077 (1907).

(H. R. 16136, 63d Cong., 2d Sess. (1914)), western Congressmen expressed concern that under the bill the States might be unable to tax the production of federal lessees. Representative Lenroot of Wisconsin took the lead in answering western fears by pointing out that a "State can tax the product of that mine [leased under the bill] *just such sum as it* [the State] *chooses.*" 51 Cong. Rec. 15058 (1914). Later, referring to a Colorado company mining coal on lands it owned, Rep. Lenroot and Rep. Mondell of Wyoming engaged in the following colloquy:

> Mr. Lenroot: * * *
>
> * * * [M]uch has been said concerning the matter of taxation and the denial of these States of taxes to which they are entitled. Again, referring to the Colorado Iron and Fuel Co., they do pay some taxes, it is true, to the State of Colorado upon their lands; but if those lands were under lease, the State of Colorado would receive under this bill one half of the proceeds of these [federal] royalties, and *in addition the state of Colorado could tax the output—every ton of coal mined by the Colorado Iron and Fuel Co.—in such sums as its legislature in its wisdom might choose to impose.*
>
> * * *
>
> Mr. Mondell:
>
> Is the gentlemen sure—quite sure—as a legal proposition that the State can tax the output of these leased mines?
>
> Mr. Lenroot:
>
> I am absolutely certain. * * *
>
> Mr. Mondell:
>
> I am glad to have the gentleman's opinion and I hope he is right because this is our only hope under this legislation.

51 Cong. Rec. 15064-65 (1914) (emphasis supplied).

Later in the debate, Representative Ferris, sponsor of the bill and Chairman of the Public Lands Committee which favorably reported the bill to the floor of the House, lent his support to Representative Lenroot's assurances, stating "[t]here is no doubt but that your legislature has the authority to impose an excise tax that will catch every pound of coal and every gallon of oil produced," and that this taxing authority was in addition to any royalty sharing. 51 Cong. Rec. 15558 (1914).

Although the bill under consideration in the debate recited above contained no express recognition of state taxing power, this was remedied in the next Congress when the House Committee on Public Lands offered an amendment to the pending leasing bill. After minor changes in the Committee's proposal, the House adopted the amendment, which contained language nearly identical to that ultimately enacted as section 32 of the Mineral Lands Leasing Act of 1920.[16]

In the House debate immediately preceding passage of the 1920 Act, Representative Mondell again stressed that the proviso affirmed state power to tax leasehold improvements and mine output of federal lessees. 58 Cong. Rec. 7646 (1919). Despite protests that under the proviso the

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16 The amendment adopted by the 64th Congress read:

> Provided that nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessees.

53 Cong. Rec. 1122-1123 (1916). Representative Mann of Illinois characterized the proposition that the states could tax the property of lessees as one on which "we are all agreed," 53 Cong. Rec. 1122 (1912); the adoption of the amendment reflected that view.

states would have the power to levy "burdensome taxes" and thereby ruin lessees and render the leases of no value (58 Cong. Rec. 7647 (1919) (remarks of Rep. McLaughlin)), Congress passed section 32 without further changes.

Congress thus intended by section 32 to grant the states permission to impose severance taxes on coal and other minerals at the rate the states themselves deemed appropriate.[17] Both proponents and opponents of section 32 agreed that the proviso had that purpose and effect.

The significance of section 32 to appellants' arguments[18] in this Court is apparent. Since Congress has granted express permission to the states to do precisely what appellants protest—namely, exercise the plenary power to set their own severance tax rates—it cannot be said that the rate of a state severance tax may render the tax unconstitutional.[19]

For similar reasons, appellants' Supremacy Clause arguments must be rejected in light of section 32. Montana's tax cannot be considered inconsistent with federal law when Congress itself has ratified the state's power

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17 While section 32 of the Mineral Lands Leasing Act applies only to taxation of federal lessees, it is inconceivable that Congress intended to permit states greater authority to tax federal lessees than other taxpayers.

18 The appellants continue to assert that the coal taxed by Montana is federal coal, and thus belongs to the people of the United States as a whole. What they ignore is that through leases the federal government has sold its interests in the coal and the people of the United States, through royalties, will receive their fair rate of return. [See Opinion below J. S. 27 (a).]

19 See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 434-36 (1946); *In re Rahrer*, 140 U. S. 545 (1891); see *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769 (1945).

and authority to impose the tax and set the rate. While appellants may believe that contemporary conditions warrant restrictions on the states' authority, that is a matter for Congress to decide. Until and unless Congress acts,[20] Montana is free to exercise the authority confirmed in section 32 of the Mineral Lands Leasing Act of 1920.

We therefore submit that section 32 is a sufficient basis for rejecting each of appellants' contentions regarding Montana's tax. In the discussion that follows we address each of appellants' Commerce and Supremacy Clause arguments and discuss why, even aside from section 32, those arguments must be rejected.

II. Settled Commerce Clause principles and sound institutional considerations fully support the Montana Supreme Court's dismissal of appellants' attack on the rate of Montana's coal severance tax.

A. The Decisions of This and Other Courts Repudiating Commerce Clause Challenges to State Severance Taxes Reflect Wise and Established Principles of Commerce Clause Adjudication and Should Not Be Disturbed.

The arguments appellants raise are not new. For nearly sixty years this Court and other courts have consistently rejected Commerce Clause attacks on state severance taxes. *See, e. g., Heisler v. Thomas Colliery Co.,* 260 U. S. 245 (1922); *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172 (1923); *Hope Natural Gas Co. v. Hall,* 274 U. S. 284 (1927); *Bel Oil Corp. v. Roland,* 242 La. 498, 1137 So. 2d

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20 See *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U. S. 425, 448-449 (1980); *cf. United States v. Detroit,* 355 U. S. 466, 474 (1958).

308, *appeal dismissed,* 371 U. S. 2 (1962); *Post Oak Oil Co. v. State Tax Commission,* 575 P. 2d 965 (Okla. 1978); cf. *Merrion v. Jicarilla Apache Tribe,* 617 F. 2d 537 (10th Cir.) (*en banc*), *cert. granted,* 101 S. Ct. 71 (1980). Contending that a severance tax upon coal destined for shipment to other states burdened interstate commerce, the taxpayers in *Heisler v. Thomas Colliery Co., supra,* argued, as appellants argue here, that:

> Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern States. Eighty percent of such coal is shipped out of Pennsylvania . . . [and the] intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of the United States to pay a tax to Pennsylvania. (260 U. S. at 251-52.)

Despite these allegations the Court held that Pennsylvania's tax on the local activity of severing natural resources from the earth did not constitute a burden on interstate commerce within the meaning of the Commerce Clause.

Appellants make no effort to distinguish the present case from *Heisler* and its progeny. Instead, they argue that times have changed, that the country now has a pressing need to develop its energy resources, and that *Heisler* rests on an outmoded analysis of the Commerce Clause.

Appellant's prediction of "grave practical consequences to this nation" unless the rate of each state's severance tax is subject to judicial examination at a trial completely ignores both inherent market limitations in fixing tax rates and the role of Congress under the Com-

merce Clause. Appellants argue that the scope of congressional power to regulate interstate commerce has expanded considerably since the Court decided *Heisler,* however, they fail to recognize that as a result Congress has ample authority to deal with severance tax rates on coal if it should deem this necessary or appropriate.[21] Rather than a reason for overruling *Heisler,* the expansion of congressional power is a reason for adhering to that decision.

Citing cases such as *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937) and *Wickard v. Filburn,* 317 U. S. 111 (1942), appellants argue that because Congress could determine the appropriate limits of such tax rates, the courts should do so. Appellants, however, have confused the Commerce Clause's affirmative grant of power to Congress "to regulate Commerce. . . . among the several States," U. S. Const., Art. I, § 9, cl. 3, with the negative implications of the Clause. This Court has consistently recognized the substantial differences between Commerce Clause considerations bearing on the scope of congressional power and those bearing on the limitations on state power. See, *e.g., Minnesota v. Blasius,* 290 U. S. 1, 8 (1933).

Thus while appellants cite *Wickard* for the proposition that the Commerce Clause's negative restraints have been broadened by decisions expanding the scope of congressional power (App. Br. 18, 21), the Court in *Wickard*

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21 Congress, unlike the Court, has numerous options available. It could, for example, prohibit the pass through of the tax by coal companies; provide federal tax deductions to offset the tax; or pass legislation giving the states an incentive to reduce their taxes.

made exactly the opposite point. The Court observed that the scope of congressional authority depended on an inquiry into "what was 'necessary and proper' to the exercise by Congress of its granted power," 317 U.S. at 121, whereas the point of reference for limitations on state authority was the "concept of sovereignty . . . implicit in the status of statehood." *Id.* Hence in determining whether Congress had the authority under the Commerce Clause to regulate activities affecting interstate commerce, the Court in *Wickard* was not confined by the holdings in cases such as *Heisler,* that state taxes on those activities imposed no burden on interstate commerce. This was not because these cases were no longer authoritative but rather because the considerations underlying the scope of congressional power under the Commerce Clause are of little aid in determining whether state action burdens interstate commerce.[22] As the Court recently observed:

> [S]tatements . . . made in upholding the rights of States to tax what was argued to be interstate commerce . . . are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the Commerce Clause. The restrictions imposed by the Commerce Clause standing alone may well be less than the preemptive reach of statutes passed by Congress pursuant to the power. (*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 n. 17 (1977).)

Appellants also contend that the Montana Supreme Court's adherence to *Heisler* contravenes *Nippert v. City*

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22 To take the facts of *Wickard* itself, it can hardly be contended that the existence of congressional power to regulate the production of wheat grown for "home" consumption warrants the inference that a state tax upon such consumption imposes a burden on interstate commerce.

of Richmond, 327 U.S. 416 (1946). See App. Br. 22. *Nippert* is one of a long line of cases involving fixed-fee license taxes imposed on solicitation of orders for interstate sales.[23] From the beginning, the Court has held that solicitation of interstate sales is an integral part of interstate commerce and that a tax upon such activity imposes a burden on commerce. *Robbins v. Shelby County Taxing District,* 120 U.S. 489 (1887). The Court, however, has been careful not to obliterate the distinction between taxes that do and taxes that do not burden interstate commerce. See, *e.g., Caskey Banking Co. v. Virginia,* 313 U.S. 117, 119 (1941).

Countless other decisions of this Court reflect the settled principle on which the severance tax decisions are based: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause, *see, e.g., Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U.S. 537 (1969); *Alaska v. Arctic Maid,* 366 U.S. 199 (1961); *Caskey Baking Co. v. Virginia, supra.* The continued existence of this threshold requirement—that a state tax must burden interstate commerce to justify an inquiry into the substantive criteria for adjudicating Commerce Clause controversies—is demonstrated by the Court's opinion in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). The Court in *Pike* explicitly addressed this "threshold contention" in the context of

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23 *Nippert* itself involved a license tax upon "persons . . . engaged in business as solicitors" measured by a fixed fee and a percentage of gross receipts.

a challenged state regulation, *Id.* at 140.[24] Moreover, it carefully distinguished two state tax cases that had relied in part on previous severance tax decisions in concluding that the levies at issue did not burden interstate commerce. *See Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassanoil v. City of Greenwood,* 291 U.S. 584 (1934), discussed at 397 U.S. at 141.

The court below thus correctly held that before undertaking an inquiry into the tax's validity under substantive Commerce Clause criteria, a court must find that the tax burdens interstate commerce within the meaning of the Clause. Otherwise every allegation that a tax affects interstate commerce would require an elaborate inquiry under the Commerce Clause; no state tax would be free from Commerce Clause attack; and any state taxpayer could generate a substantial lawsuit merely by asserting that the levy affects interstate commerce. This Court has therefore recognized the necessity of drawing a line between challenges to taxes that burden interstate commerce, which justify a further inquiry into whether the burden is defensible, and challenges to taxes that do not burden interstate commerce, which may be dismissed.

State severance taxes have never been viewed as imposing a burden on interstate commerce. The essentially local nature of the activity taxed—the extraction of natural resources from the earth—and the remoteness of the

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24 The Court's holding on this point—that an order expressly forbidding interstate bulk shipment burdens interstate commerce—was unexceptional. A more onerous burden on interstate commerce is difficult to imagine.

activity from the stream of commerce,[25] have consistently led this and other courts to conclude that Commerce Clause attacks on such levies may be disposed of summarily. Recent decisions of this Court continue to adhere to this view. *Dunbar-Stanley Studios, Inc. v. Alabama, supra; Alaska v. Arctic Maid, supra.*[26] Furthermore, this Court's repeated approval of its severance tax decisions reflects the wise judgment that abandonment of them could create judicial and administrative chaos and that Congress, not the Judiciary, is the only body with constitutional authority and institutional competence to determine what limits, if any, should be imposed on the rate of state severance taxes (see p. 34, infra).

B. Montana's Coal Severance Tax Satisfies This Court's Requirements That A Tax Be Fairly Related to Benefits Provided by the State and That It Not Discriminate Against Interstate Commerce.

Although we submit that the Court's severance tax cases are dispositive of appellants' Commerce Clause claims, Montana's coal severance tax also passes muster under the substantive criteria the Court has articulated

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25 Compare with *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1979).

26 Appellants seek to minimize the significance of the Court's contemporary opinions that embrace the rule of the severance tax cases by arguing that the severance tax cases are cited only for the proposition that taxpayers engaged in certain activities are not immune from taxation. App. Br. 20. n. *. As a fair reading of *Dunbar-Stanley* and *Arctic Maid* demonstrates, however, the severance tax cases were invoked for the broad proposition that they still support: A tax on the extraction of natural resources does not burden interstate commerce.

in recent opinions involving state tax controversies. The Court has stated that it will sustain a tax against Commerce Clause challenge

> [w]hen the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. (*Complete Auto Transit, Inc. v. Brady, supra,* 274, 279 (1977).)

Applying these standards, the Montana Supreme Court properly concluded that Montana's coal severance tax was fairly related to benefits provided by the state and did not discriminate against interstate commerce.[27] J. S. 19a-27a.

1. Montana's Coal Severance Tax Is Fairly Related to the Benefits Provided Appellants by the State.

The state court's determination that Montana's coal severance tax is fairly related to benefits provided by the state is unassailable. Montana has provided the appellants with unquantifiable benefits. It has provided them with the benefits of fire and police protection; of an educated work force; of roads and waterways; an organized government; an orderly system of laws and an economic infrastructure and social machinery that are essential preconditions to the conduct of modern business activity. These benefits are of incalculable value and plainly satisfy the consideration that a tax be fairly related to benefits

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27 Appellants conceded below that the activities taxed have a substantial nexus to the State and that the tax is fairly apportioned to activities carried on there. Brief of Plaintiffs-Appellants 52.

provided by the state. The Court's statement in regard to a California levy is dispositive here:

> The tax . . . is "fairly related to the services provided by" California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society. (*Japan Line Ltd. v. County of Los Angeles*, 441 U. S. 434, 445 (1979).)

See also *Exxon Corp. v. Wisconsin Department of Revenue*, 100 S. Ct. 2109, 2122 (1980).

Appellants' contend, however, that before considering the "fair relation" criterion a court must undertake a detailed factual inquiry into the question whether the market value of the benefits provided the taxpayers is substantially equivalent to the amount of the tax imposed. They argue that a trial is necessary to determine "whether a reasonable relationship exists" between the amount of the tax and the "costs or benefits involved," including "the legitimate needs of Montana." App. Br. 30-31. Appellants' contention finds no support in the relevant decisions of this Court or in sound principles of constitutional adjudication.

The Court has never suggested that the "fair relation" criterion contemplates a detailed factual investigation into the value of particular state-provided benefits or taxpayer-imposed costs to determine what particular quantitative relationship they bear to the amount of a general excise tax like Montana's.[28] Nor has the court

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28 As indicated above (see p. 3, *supra*) and as the Montana Supreme Court explicitly held (J. S. 22a), the coal severance

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suggested that based upon a potentially monumental inquiry, the courts must then decide what is "fair." This Court knows what is apparent not only to every state legislature, but to Congress itself.

> [A] tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principles of government—that it exists primarily to provide for the public good. A corporation cannot object to the use of taxes which it pays for the maintenance of schools because it has no children. . . . This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are not peculiarly beneficial to him. (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 522-23 (1937).)

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tax was "imposed for the general support of the government." Appellants originally took no issue with this conclusion (J. S. ii), although now they suggest that the levy is not imposed for the general support of government because some of the tax revenues will not be immediately expended. App. Br. 30. While this contention is a non-sequitur, the critical point for present purposes, which appellants do not and indeed, cannot dispute, is that Montana's tax is a levy imposed for broad governmental needs such as environmental protection and public education, § 15-35-108, MCA, as distinguished from a levy imposed as a charge for a specific state-provided service. *See* pp. 31-32, *infra*.

Accord, *St. Louis & S.W. Ry. Co. v. Nattin,* 277 U. S. 157, 159 (1928); *Thomas v. Gay,* 169 U. S. 264, 280 (1898); *American Commuters, Ass'n. v. Levitt,* 405 F. 2d 1148, 1152-53 (1969). Thus, in rejecting a Commerce Clause challenge to the application of Louisiana's business privilege tax on an interstate pipeline company, the Court, after adverting to the "fair relation" criterion, declared that "[t]he simple but controlling question is whether the state has given anything for which it can ask return." *Colonial Pipeline Co. v. Triagle,* 421 U. S. 100, 109 (1975) (quoting *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 444 (1940)). It concluded that the "powers, privileges, and benefits" Louisiana had bestowed upon the pipeline —namely, the benefits and privileges associated with its ability to carry on business in corporate form—were sufficient to justify the tax. 421 U. S. at 109. The Court made no effort to ascertain the precise value of these benefits to the taxpayer.

Similarly, in dismissing Commerce Clause objections to the application of Washington's business privilege tax on gross receipts from stevedoring activities, the Court summarily disposed of the taxpayer's "fair relation" contention with the remark that "[n]othing in the record suggests that the tax is not fairly related to services and protection provided by the State." *Department of Revenue v. Association of Washington Stevedoring Cos.,* 435 U. S. 734, 750-51 (1978). There is nothing to suggest that the Court based its conclusion on a considered judgment that the value of specific benefits provided by the state had some particular quantitative relationship to the amount of the tax. Indeed, as Justice Powell's concurring opinion observed, the Court's conclusion that the "fair relation"

test was satisfied "cannot be questioned" since the taxpayers "undoubtedly avail themselves of police and fire protection, as well as other benefits Washington offers its local businesses." *Id.* at 764.

The Court's most recent observations that the "fair relation" criterion will be satisfied if the state provides the taxpayer with "the benefit of a trained work force, and 'the advantages of a civilized society,'" *Exxon Corp. v. Wisconsin Department of Revenue, supra,* 100 S. Ct. at 2122; *Japan Line, Ltd. v. County of Los Angeles, supra,* 441 U. S. at 445, further demonstrate that a trial with an elaborate factual investigation is unnecessary to resolve the "fair relation" issue.[29] Appellants' contrary position is an invitation to transform the courts into legislative committees to hold hearings into whether a certain tax rate is "fair" and allow taxpayers to attempt to quantify what benefits they receive from the State. But appellants do not suggest how a court is to value the benefits of police and fire protection, the elaborate network of roads and waterways, or the orderly system of laws that Montana provides them. We are not told how a court is to measure in dollar terms the value of a trained work force or the economic infrastructure and social machinery that are essential preconditions to the conduct of modern business activity. One can only guess by what standard a court should assess costs imposed on Montana as a result of the loss of aesthetic values, the increases in crime, alcoholism, and divorce, and the exhaustion of a nonrenew-

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29 Montana's position is even stronger if one compares the nature of the contacts with the State in those cases with the strip mining activity conducted in this case.

able resource that constitutes the state's economic base. How can a court measure in dollar terms the costs of environmental degradation that are presently unknown and, indeed, unknowable? If appellants' coal-mining activities destroy Montana's underground aquifers, in which much of the state's scarce water supply flows, it will literally destroy the lifeblood of Montana society. The impact appellants' activities will have is not something that can presently be determined.[30] The only certainty is that after the last ton of coal is mined and the last dollar of severance tax is paid, Montana will have to deal with these and a host of other problems that the coal companies leave in their wake.[31]

The State vigorously disputes appellants' self-serving assertion that there is "unlikely" to be a "serious dispute" over the "fair relation" issue should the matter be remanded for trial (App. Br. 31). But to require the State of Montana to demonstrate the present and future benefits it furnishes appellants would surely precipitate attacks on the "fairness" of the various revenue measures of other states. According to appellants' Commerce Clause theory, an allegation by a taxpayer that a state is "exporting" its tax burden entitles the taxpayer to a trial on whether the tax is "fairly related" to benefits provided by the state App. Br. 29-31. Since every state in the

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30 See generally, D. Weiner, *Reclaiming the West: The Coal Industry and Surface-mined Lands* (Inform, Inc., N. Y., N. Y. 1980).

31 Montana is wisely setting aside in trust a part of its severance taxes so that future generations will not have to bear the cost of these burdens without the possibility of assistance from the very activity which created them.

country "exports" its tax burden to some extent,[32] there would be no end to "fair relation" challenges to state revenue measures. No doubt Texas, which appears here as an *amicus,* will soon be defending the fairness of its own severance taxes on oil and gas, which are substantially equivalent to Montana's tax on coal when the levies are compared on equivalent units of energy, see pp. 4-5, *supra.*

Nor will taxpayers by any means be confined to severance taxes in mounting "fairness" challenges to state revenue measures. New York's tax on stock transfers[33] which falls heavily on out-of-staters,[34] Florida's tax on hotel and motel receipts[35] which falls largely on tourists, and Michigan's taxes on the automobile industry[36] which are passed on to consumers nationwide, are all vulnerable to the charge that the state is attempting to tailor its taxes to fall largely on non-resident consumers. Indeed, even general income and sales taxes would be subject to such an attack.[37]

Finally, appellants rely on several cases in which the Court has allegedly undertaken a detailed factual inquiry into the "fair relation" question in adjudicating the validity of a state tax. See App. Br. 32 citing, *e. g., Evans-*

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32 See McLure, *The Interstate Exportation of State and Local Taxes: Estimates of 1962,* 20 Nat. Tax J. 49 (1967).

33 N. Y. Tax Law § 270 *et seq.* (McKinney 1966, Supp. 1980-81).

34 See *Boston Stock Exchange v. State Tax Comm'n,* 429 U. S. 318 (1977).

35 Fla. Stat. Ann. § 212.03 (1980).

36 *E. g.,* Mich. Comp. Laws Ann. § 208.1 *et seq.* (Supp. 1980-81).

37 See McLure, *supra,* note 22.

ville Airport v. Delta Airlines, Inc., 405 U. S. 707 (1972). Every one of these cases, however, involved a fee that was designed and defended as a specific charge imposed by the state for the use of state-owned or state-provided transportation facilities or services. These "user charges" are assessed as reimbursement for specific quantifiable services furnished by the government to the user, not for general revenue purposes. Highway use taxes and similar levies "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." P. Hartman, *State Taxation of Interstate Commerce*, 20 n. 72 (1953). They are "rather of the nature of a rent charged by the State, based upon its proprietary interest in its public property . . ." *Id.* at 122. It may well be appropriate in cases involving such fees to inquire into the relationship between the amount of the fee and the specific service or benefit for which the fee is charged. The holdings of those cases, however, have no bearing on the validity of a general excise tax, such as the coal severance tax, which is neither designed nor defended as a *quid pro quo* for a particular service or benefit rendered by the state.

2. Montana's Coal Severance Tax Does Not Discriminate Against Interstate Commerce and Is Not "Tailored" to Fall on Residents of Other States.

Montana's coal severance tax is "imposed on each ton of coal produced in the state." Section 15-35-103, MCA. The levy is nondiscriminatory on its face. It applies to all coal extracted in the state; it applies without regard to the ultimate destination of the coal—whether inside or outside the state; and it applies without regard to the nature

of the enterprise extracting the coal—whether local or interstate. No claim is or can be made that the coal severance tax explicitly discriminates against interstate commerce.

It is true, of course, that the Commerce Clause forbids taxes which, though nondiscriminatory on their face, by their practical operation discriminate against interstate commerce. *See, e. g., Nippert v. City of Richmond, supra.* Montana's coal severance tax cannot reasonably be characterized as such a levy, however. The degree to which either local or interstate business shoulders the burden of the tax is determined according to the amount or value of the coal extracted and not according to any distinction—in principle or in practice—between local and interstate commerce. Coal consumed in Montana is not treated differently than coal destined out-of-state. Appellants have never contended otherwise, and appellants' concession that Montana may properly tax coal at some lower rate contradicts their assertion that the tax is discriminatory.

To the extent that appellants' claim of discrimination is predicated on the fact that the coal in question is transported out-of-state so that the tax burden allegedly falls on out-of-state consumers, it fails to state a claim under the Commerce Clause. The states do not discriminate against interstate commerce—nor do they improperly "tailor" their taxes to fall on residents of other states—when they demand from those consuming local resources payment for the costs imposed on and benefits provided by the state with respect to the extraction of these resources. Interstate commerce, this Court has frequently held, must pay its way. *See e. g., Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 254 (1938).

By conceding that Montana has power to impose a coal severance tax on their activities (App. Br. 6), appellants have conceded that the tax is not by its nature illicitly discriminatory or "tailored." Their theory is that it becomes so only when the rate gets too high. Appellants' discrimination and "tailored tax" claims are rooted in their contention that the tax is "excessive" (J. S. i) and that interstate commerce is therefore being made to pay *more* than its way, which merely restates their argument that the coal severance tax is not fairly related to benefits provided by the state. Because the "fair relation" criterion is met in this case (*see* pp. 24-32, *supra*), it cannot plausibly be argued that interstate commerce is paying more than its way.

C. Sound Institutional Considerations Reinforce the Conclusion That Appellants' Commerce Clause Claims Were Properly Dismissed.

As we have indicated, the heart of appellants' case is "that the tax is excessive in amount and thereby violates the Commerce and Supremacy Clauses of the Constitution." (J. S. i, App. Br. 6). By appellants' reasoning there must be some rate at which the tax would pass constitutional muster, and it is the task of the courts to ascertain that rate.

The judiciary, however, has never undertaken the task that appellants would thrust upon it—the determination of the appropriate rate of a general excise tax. Indeed, whenever taxpayers have invited this Court to become embroiled in controversies over the amount of a general excise tax, it has steadfastly declined to do so. *See, e. g., City of Pittsburgh v. Alco Parking Corp.*, 417 U. S. 369

(1974) and cases cited therein; *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934). While many of the cases repudiating challenges to taxes on the basis of their amount involved the Due Process Clause, their reasoning is applicable to Commerce Clause challenges as well.[38] The Court's decisions are predicated on the fundamental consideration—ignored by appellants here—that the determination of the proper rate of a tax is quintessentially a legislative judgment beyond the pale of judicial competence.

The Court's recognition that determining the proper rate or amount of a state tax is not a judicial function, reflects sound institutional considerations. If courts were saddled with the responsibility of determining the appropriate amount of a tax, based on an inquiry into the quantitative relationship between the tax burden and the costs and benefits involved, they would become entangled in issues which they are institutionally ill-equipped to resolve. Given the inherent limitations of a court's own resources and the judicial process, a court is simply incapable of putting a dollar value on ecological damage, social disruption, and the loss of an economic base. Courts would also be required to struggle with the elusive question of the economic incidence of the tax to determine whether a taxpayer who alleges that he is paying an "excessive" tax is actually bearing the tax burden.[39]

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38 See P. Hartman, *State Taxation of Interstate Commerce* 19 (1953).

39 *See, e. g.*, Hogan and Shelton, *Interstate Tax Exportation and State Fiscal Structures*, 26 Nat. Tax J. 553 (1973); McLure,

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This Court's consistent position that such issues are not judicially cognizable does not mean that there are no restraints on Montana's power to set its own tax rates or that taxpayers aggrieved by the rate of a state tax affecting interstate commerce have no avenue for relief. While a court is an inappropriate forum for determining the rate of a tax, a legislative body is fully capable of making such a determination. And in the context of the present controversy, it is Congress that has the ultimate responsibility to contend with Montana's coal severance tax rates, if it sees fit to do so.

Congress, in fact, has been focusing abundant attention on national energy policy in general and on the very issues that divide the parties here. Legislation directed specifically at the problem appellants seek to have this Court resolve was introduced in the Ninety-Sixth Congress;[40] hearings at which appellants fully presented their views were held on the proposed legislation;[41] and the legislation was approved by the House Subcommittee on

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Economic Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 257 (1978); McLure, *supra* note 32; Shelton and Morgan, *Resource Taxation, Tax Exportation and Regional Energy Policies*, 17 Nat. Res. J. 261 (1977).

40 S. 2695, 96th Cong., 2d Sess. (1980); H. R. 7163, 96th Cong., 2d Sess. (1980); H. R. 6654, 96th Cong., 2d Sess. (1980); H. R. 6625, 96th Cong., 2d Sess. (1980).

41 Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2d Sess. (1980); Coal Severance Taxes: Hearing on H. R. 6625, H. R. 6654 and H. R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980).

Energy and Power.[42] Similar legislation has already been introduced this session. S. 178, 97th Cong., 1st Sess. (1981).

It is therefore apparent that Congress is fully aware of and involved in the conflict that only the legislative branch is capable of resolving. In recent years, Congress has shown itself willing to legislate in the state tax field when, in its judgment, state tax legislation threatened to impose a burden on interstate commerce.[43] Armed with the extensive information provided by its hearings and by staff research, Congress can make an informed political judgment as to whether a rate limitation or other action to offset state severance taxes is warranted. As this Court has frequently recognized, the resolution of such issues has been committed by the Constitution to the legislative branch. *See, e. g., Moorman Manufacturing Co. v. Bair*, 437 U. S. 267, 280 (1975).

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42 Report Bulletin No. 12, Prentice Hall State and Local Taxes (All States Unit) (Sept. 16, 1980).

43 See 15 U. S. C. § 381 *et seq.* (1976) (limiting states' power to tax income from interstate commerce); 15 U. S. C. § 391 (1976) (prohibiting states from imposing electrical energy taxes discriminating against out-of-state purchasers); 15 U. S. C. § 78bb (d) (1976) (prohibiting states from imposing stock transfer taxes when the only nexus between the state and the transaction is the presence of the transfer agent); 49 U. S. C. § 1513 (1976) (prohibiting states from imposing user charges in connection with the carriage of persons in air commerce). 49 U. S. C. § 11503 (1978) (prohibiting states from taxing railroad property more heavily than other industrial and commercial property); Motor Carrier Act of 1980, Pub. L. 96-296 § 31, 94 Stat. 793 (to be codified at 49 U. S. C. § 11503a) (prohibiting states from taxing motor carrier property more heavily than other industrial and commercial property.)

III. The state court properly dismissed appellants' claims that the rate of Montana's coal severance tax frustrates broad national coal policies and goals.

Appellants' Supremacy Clause claims, like their Commerce Clause claims, are in substance an attack on the rate of Montana's coal severance tax. Appellants concede that no federal law or policy prevents Montana from levying some kind of coal severance tax (App. Br. 6), but assert that Montana's tax is preempted on the ground that the rate of the tax is purportedly repugnant to "the basic thrust of federal policy," App. Br. 16, 46-47.

Appellant's preemption claims are subject to the same fundamental objections that have already been raised: Congress has affirmatively approved the authority of the States to determine severance tax rates and, in any event, the determination of the proper rate or amount of a tax is a state prerogative and a legislative not a judicial function. Even if Congress had not adopted affirmative legislation endorsing the state's right to set severance tax rates, see pp. 11-16, *supra,* it is inappropriate for a court to invalidate a state tax solely on the ground that the rate is too high. No court has ever held a tax preempted on that basis.

Moreover, appellants have seriously misconstrued the nature and effect of national policies concerning coal. Their assertion that the rate of a state tax may be preempted because it increases the cost of some federally favored activity finds no support in settled principles of preemption analysis.

A. Montana's Coal Severance Tax Does Not Frustrate the Purposes and Policies Embodied in the Federal Legislation Cited by Appellants.

Appellants' Count II preemption claim is based on a selective reading of national energy legislation, through which they have attempted to carve out an alleged policy regarding western coal. Although appellants have cited numerous federal statutes dealing with coal and energy in general (App. Br. 5, note*) nowhere do they contend that the Montana Coal Severance Tax is preempted by any specific provision of any of these acts. In fact, congressional action in the area of coal policy has been specific and limited, and there is nothing in existing legislation to suggest that Congress either intended to limit state taxes on coal or to elevate any policy encouraging coal use to preeminence over other policies which may reduce its use or increase its cost. To the contrary, congressional action reflects a continued solicitude for state tax powers and for other state and national policies that may compete with coal policy.

Section 32 of the Mineral Lands Leasing Act of 1920, 30 U. S. C. § 189, *supra,* expressly endorses the authority of states to impose mineral severance taxes. A similar acknowledgment appears in section 601, Title VI, Power Plant and Industrial Fuel Use Act of 1978 (Pub. L. 95-620, 92 Stat. 3289), codified at 42 U. S. C. § 8401, which provides for federal financial assistance in areas suffering adverse economic consequences from coal development. In determining an impact area's need for federal assistance, the section requires that other state and local resources shall be taken into consideration, "*including severance tax revenue* . . . to the state and local governments

which are associated with the increase in coal . . . development activities . . ." *Id.* (emphasis supplied).

Congress has adopted very specific and limited means for encouraging coal development and use. The Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, 89 Stat. 871) adopts incentives for development of underground coal mines, 42 U. S. C. § 6211; makes provision for export restrictions, 42 U. S. C. § 6212; and provides for the creation of strategic coal and other fossil fuel reserves, 42 U. S. C. § 6231 *et seq.*

Congressional action in other areas recognizes the continued importance of competing national policies despite their potentially adverse impact upon the production, cost and use of coal. Miners of coal, low sulfur and high sulfur alike, are neither exempt from costly environmental and strip mining regulations, see 30 U. S. C. § 1251 *et seq.*, nor from health and safety requirements under the Federal Coal Mine Health and Safety Act, 30 U. S. C. § 801 *et seq.*, even though these requirements may increase the cost of coal. The Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.*, reflects a congressional preference for underground coal mining because of its limited environmental impact and demonstrates that Congress is perfectly willing to countenance an increase in the costs of coal production, in Montana and elsewhere.

Furthermore, regional economic concerns continue to predominate over any broad, unitary coal policy. For example, in the Clean Air Act Amendments of 1977 (Pub. L. 95-95, 91 Stat. 685), Congress required "application of the best technological system of continuous emission re-

duction" for all new stationary sources, including those burning low sulfur coal. 42 U. S. C. § 7411. The legislative history of this requirement reveals congressional dissatisfaction with the use of low sulfur western coal to meet air emission standards and reflects a congressional intention to (1) reduce reliance upon western coal, and (2) promote expanded use of high sulfur eastern and midwestern coal. By requiring the best technologically feasible reduction of sulfur emission with respect to low sulfur coal, Congress abolished the then prevalent practice of burning untreated low sulfur coal to meet air emission standards and thereby increased the cost of burning low sulfur coal in the hope of making eastern high sulfur coal more competitive in the market place, spurring the eastern coal economy, and reducing national reliance upon low sulfur western coal. 1977 U. S. Code Cong. & Ad. News 1245, 1510, 1575.

With a similar purpose, Congress granted state governors, the Environmental Protection Agency, and the President authority to prohibit a major fuel burning stationary source "from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements" upon a finding that such action "is necessary to prevent or minimize significant or regional economic disruption or unemployment. . . ." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 122, codified at 42 U. S. C. § 7425.[44]

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44 See generally *The Clean Air Act Amendments of 1977: A Selective Legislative Analysis*, 13 Land & Water L. Rev. 747, 800-12 (1978).

In sum, the specific provisions of federal coal legislation define the contours of national policy in this domain. These provisions belie the existence of "a national intent to maximize the production and use of western low sulphur coal" (App. Br. 38) at the expense of other considerations. They contain no provision that even remotely reflects an intent to limit the amount of a state severance tax. Instead, as the court below properly concluded, the "basic thrust" of federal policy is to accommodate the diverse concerns of the nation, the regions, and states, even though the resulting costs including those which might be attributable to state severance taxes, may increase the price of coal.[45] See J. S. 33a-34a.

B. Under Settled Principles of Preemption Analysis, the Asserted National Policies on Which Appellants Rely Cannot, as a Matter of Law, Invalidate a State Tax.

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45 There is no certainty that the Montana tax is or need be passed on in whole or even in part to consumers. See M. Gillis, *Severance Taxes On Energy Resources in the U. S.*, Growth and Change (Jan., 1979). Moreover, even if Congress were to limit state severance tax rates, the limitation would have little impact on the cost of coal. The tax is only a small fraction of the ultimate cost of coal generated energy. The cost of transporting coal far exceeds the amount of the tax; that cost recently drew criticism from the President's Commission on Coal, which found that the Interstate Commerce Commission had established rate guidelines allowing railroads a "7%" premium for coal traffic, a premium which is intended to "subsidize other traffic moving at less than full costs. * * *," *Staff Findings* 20 (1980). Capital costs for coal fired generators are three to five times the cost of oil and gas fired generators. President's Commission on Coal, *Coal Data Book* 54-55 (1980). Operating costs, a fair profit for the utility company, and the taxes of the consuming state must also be added.

Even assuming that it were possible to extract from the welter of statutes[46] cited by appellants a broad national policy to encourage the use of western coal and federal coal, such a policy provides no basis under established preemption doctrine for invalidating state legislation. Contrary to appellants' contention, state laws are not preempted by the "basic thrust" of a "national purpose" or "overall federal policy," App. Br. 16, 36, 39, 46-47. The Court made that point clear in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), by summarily rejecting a contention similar to that made here, namely, that a broad, general national policy favoring "free competition" can preempt a state regulatory scheme. The claim advanced by appellants in *Exxon* was that a state statute prohibiting producers or refiners of petroleum products from operating retail service stations in the state was invalid because it interferred with a national policy favoring "free competition." Because the contention was strikingly similar to the one advanced by appellants herein, this Court's response bears quotation:

> Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the Maryland statute "undermines" the competitive balance that Congress struck between the Robinson-

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46 Appellants also rely on "official pronouncements by the President and members of his Cabinet," App. Br. 36. Whatever the import of these pronouncements, they are of scant relevance to this case. It is federal legislation, not speeches by the President or his appointees, that preempts state law. The various "official" and often irreconcilable pronouncements that emanate daily from Executive Branch personnel and shift dramatically from administration to administration, do not constitute "Laws of the United States," U. S. Const. Art. VI, cl. 2, and cannot be the basis for judicial invalidation of a state statute under the Supremacy Clause.

> Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if any adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. (437 U.S. at 133-134.)

Accord, New Motor Vehicle Board of California v. Orrin W. Fox, 439 U.S. 96, 110-11 (1978).

While the Court's preemption decisions do not lend themselves to easy generalizations, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941), they reveal that no state law, much less a state tax law has been struck down on the basis of general national policies of the sort that underlie appellants' claim here. Findings of preemption have uniformly been predicated upon specific rights, requirements, and regulatory schemes enacted into law by Congress, or by specific administrative regulations adopted pursuant to such laws.

The cases appellants invoke for the proposition that a broad national policy may itself be the predicate for preempting a state law do not support their contention. *See Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967); *Hill v. Florida,* 325 U.S. 538 (1945), cited at App. Br. 39-40. Two of the cases, *Nash* and *Hill,* involved conflicts between state legislation and the National Labor Relations Act, "a comprehensive code passed by Congress

to regulate labor relations in activities affecting interstate and foreign commerce." *Nash*, 389 U. S. at 238. In each case, the state law was preempted because it interferred with a specific right conferred by Congress under this "comprehensive code."[47] No case has held that a broad national policy or aspiration may be the basis for preempting a state statute. The reference in many of this Court's preemption opinions to the "policies," "purposes," and "objectives" underlying particular statutes has never been a substitute for a determination that the enactments themselves -the "Laws of the United States," U. S. Const. Art. VI, cl. 2—would be substantially frustrated by the state legislation at issue. Interpretation of those "laws" may, of course, be influenced by the policy underlying them, but the policy itself is not a law.

The preemption issue raised by appellants was properly disposed of without a trial. Whether or not there are "Laws of the United States" with preemptive implications for coal severance taxes is a question that a court can and should resolve. The Court does not need the "testimony of regulators, administrators, and expert witnesses" (App. Br. 40-41) to resolve that issue. Indeed, appellants' claim that such testimony is necessary merely

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47 In *Nash*, it was the right of an employee to file an unfair labor practice complaint that was infringed by a state statute which denied unemployment benefits to persons exercising such right. In *Hill*, it was the right of employees to select their own collective bargaining agents which was curtailed by the state statute requiring licensure of union business agents and prohibiting new citizens and convicted felons from acting as collective bargaining agents. In *Jones*, federal standardized product labeling requirements were held to preempt state labeling requirements based upon different standards.

reflects their mistaken belief that such matters as a former Energy Secretary's remarks before a trade association bears on whether Montana's coal severance tax is contrary to "the Supreme Law of the Land." See App. Br. 36, n.** Nor does the question of whether a broad national policy can be used as the basis for preempting a state law require a trial. This is clearly an issue of law which a Court may properly dispose of upon a motion to dismiss, see *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938) and was treated as such by the Court in *Exxon, supra.*[48]

C. A Proper Appreciation of the Central Role of State Tax Power in the Federal System Precludes Preemption of a State Tax Solely on the Ground that the Increased Costs Associated with the Tax Indirectly Affect Implementation of Federal Policies.

Assuming that the existence of a broad national policy to encourage the production of western coal or of some unarticulated compromise in the Mineral Lands Leasing Act (App. Br. 46) could form the predicate for a preemption claim, appellants' case boils down to the proposition that a state tax may be preempted because of the indirect economic impact that the amount of the tax may have upon some federally favored activity. No state tax has ever been invalidated on this basis, and an

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48 The State would agree with appellants that a trial would be necessary to resolve the issue whether Montana's tax frustrates a national policy to encourage the use of western coal if the Court determines as a matter of law that there is such a policy and that such a policy can form the basis of a preemption claim.

appreciation of the central role of state tax power in the federal system suggests that no state tax should be.

As this Court has always recognized, the states' "power of taxation is indispensable to their existence," *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 199 (1824), and thus to the federal scheme that the framers created, *see e.g., The Federalist* No. 32 (A. Hamilton). Moreover, the exercise of state tax power has traditionally been regarded as compatible with the exercise of federal power. See *Gibbons,* 22 U.S. (9 Wheat.) at 199. Just last term the Court observed that "concurrent federal and state taxation of income, or course, is a well-established norm." *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 448 (1980). Furthermore, while a state tax may increase the costs of engaging in particular activity, unlike a state regulation, it prescribes no mode of conduct in an area in which Congress may have adopted rules of its own.

For these reasons, the economic burden imposed by a state tax should not, in and of itself, be a basis for federal preemption of state tax legislation. Every tax, after all, imposes increased costs on the person, property, or activity subject to the levy. *Union Pacific R.R. Co. v. Peniston,* 85 U.S. 5, 30-31 (1873) and see *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 275 (1943). Elementary economics teaches that such costs may reduce the demand for the goods or services taxed, and to that extent any state tax arguably threatens to "frustrate" federal law. Yet to allow such "frustration" to be a basis for preemption of a state tax is wholly inconsistent with the Court's recognition that state tax power is critical to the states' independent

existence and is generally compatible with concurrent exercises of federal power.

The Court's preemption decisions involving state taxation have never recognized the contention which appellants advance here, and indeed have consistently rejected it when presented. *E.g., Union Pacific R.R. Co. v. Peniston, supra.* Moreover, with one exception, this Court has invalidated a state tax on preemption grounds only where the tax was directed at the federal government itself, its instrumentalities, or its special wards, the Indian Tribes. *See, e.g., McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819) and other cases cited by appellants at App. Br. 41. These cases involve considerations distinct from those encountered in the usual preemption controversy and provide little guidance for preemption analysis generally. *White Mountain Apache Tribe v. Bracker,* 100 S. Ct. 2578, 2583 (1980);[49] L. Tribe, *American Constitutional Law* 391-400 (1977). The single case in which the Court invalidated a state tax on general preemption grounds was *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414 (1940), where the Court struck down a state tax upon sales of imported fuel which had been delivered as ships' stores to vessels engaged in foreign commerce. Two critical factors readily distinguish the controversy there from the instant case. First, Congress itself had withdrawn the fuel in question from federal taxation, 309 U.S. at 423, and second, the case involved foreign commerce, an

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49 The Court in *White Mountain* observed: "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." 100 S. Ct. at 2583.

area in which the primacy of federal interests warrants special consideration that may override state legislation that is otherwise unobjectionable. *Japan Lines, Ltd. v. County of Los Angeles,* 441 U.S. 434, 444-51 (1979). *McGoldrick* does, however, share one characteristic with other preemption cases involving state taxes which serves to distinguish it from the instant controversy: There was no suggestion that the rate of the tax figured in the Court's determination that it was inconsistent with federal legislation.

CONCLUSION

For the reasons set forth above, the judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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